

On appeal, the U.S. Court of Appeals for the D.C. Circuit likewise recognized that ISPs used exchange access facilities, and that, due to the FCC exemption, "[the access charges paid by ... [ISPs] may thus not fully reflect their relative use of exchange access." National Ass'n of Regulatory Util. Comm'rs v. FCC, 737 F.2d 1095, 1136 (D.C. Cir. 1984) ("NARUC"). The court upheld the FCC's temporary exemption, however, explaining that a "graduated transition" to uniform access charges was not unreasonable given the Commission's professed desire "to preserve [the ISPs'] financial viability, and hence avoid adverse customer impacts." *Id.* at 1136-37.

The FCC removed the temporary exemption for resellers in 1986. WATS-Related and Other Amendments of Part 69 of the Commission's Rules, No. 86-1, 1986 FCC LEXIS 3812 (Mar. 21, 1986); WATS-Related and Other Amendments of Part 69 of the Commission's Rules, No. 86-1, 1986 FCC LEXIS 2788 (Aug. 26, 1986). A year later, it proposed to eliminate the exemption for ISPs as well. In so doing, the FCC once again recognized that ISPs used exchange access facilities to provide interstate services, and expressed its concern "that the charges currently paid by enhanced service providers do not contribute sufficiently to the costs of the exchange access facilities they use." Amendments to Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Notice of Proposed Rulemaking, 2 F.C.C. Red. 4305, 4306 (1987) (emphasis added).

As the FCC explained, ISPs, "like facilities-based interexchange carriers and resellers, use the local network to provide interstate services. To the extent that they are exempt from access charges, the other users of exchange access pay a disproportionate share of the costs of the local exchange that access charges are designed to cover." *Ibid.* The FCC further observed

that ISPs "have had ample notice of our ultimate intent to apply interstate access charges to their operations and ample opportunity to adjust their planning accordingly." Ibid. (emphasis added). Due to intense lobbying by the information service industry, however, the FCC ultimately left the ISP exemption in place. See Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Order, 3 F.C.C. Rcd. 2631, 2633 (1988). The agency emphasized again, however, that it did not intend the exemption to be permanent. Id. at 2631-33.

The FCC reached the same result in 1991, when it again declined to eliminate the ISP exemption, on the ground that "the enhanced services industry continues to be confronted with a variety of regulatory changes." Amendments to Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 6 F.C.C. Rcd. 4524, 4535 n.110 (1991). And in its recent Access Reform Order, the FCC again acknowledged that "although information service providers may use incumbent [local exchange carrier] facilities to originate and terminate calls, ISPS [do not] pay interstate access charges." In re Access Charge Reform, First Report and Order, FCC 97-158, CC Docket Nos. 96-262 et al., ¶ 341 (May 16, 1997). Nevertheless, the FCC declined to change the ISP exemption. Id. ¶¶ 344-48. The FCC instituted a new comment proceeding, however, to address the implications of information services at a broader level, with the intention of developing proposals the FCC hopes will be "sensitive to the complex economic, technical and legal questions raised in this area." Usage of the Public Switched Network by Information Service and Internet Access Providers, Notice of Inquiry, CC Docket No. 96-763 FCC 96-488 (rel. Dec. 24, 1996).

The necessary predicate to all of these rulings, and to the temporary exemption for ISPs they created and carried forward, was the FCC's recognition that the Internet ISP Calls are

exchange access traffic. Had the Internet ISP Calls been local calls, the FCC would not have had any reason to create an exemption, and indeed would not even have had jurisdiction to do so. Nor would it have had any basis for repeatedly reconsidering that exemption, or for stating its "ultimate intent" that the exemption be temporary and that interstate exchange access charges eventually apply to ISPs. Even competing local exchange carriers and ISPs recognize that the FCC's rulings mean that the Internet ISP Calls are exchange access traffic. See FCC Docket CCB/CBD 97-30, Joint Commenters' Comments, at 12:


From the beginning the [ISP] 'exemption' has been premised on the assumption that the traffic sent between end users and [ISPs] is jurisdictionally interstate. If the traffic were not interstate, there would have been no need for an "exemption" in the first place, because interstate access charges could not lawfully have been applied.

The FCC's determination that the Internet ISP Calls are not local traffic but exchange access traffic is dispositive. The Supremacy Clause of the Constitution states "the Laws of the United States . . . shall be the Supreme Law of the Land." "The phrase 'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization." City of New York v. FCC, 486 U.S. 57, 63 (1988) (FCC regulations preempt conflicting state and local regulations). And, as a matter of law, federal statutes and federal regulations adopted in accordance with statutory authorization are incorporated into the Agreements as though they were expressly written therein. See note 5, supra. The Order's conclusion that the Internet ISP Calls are local calls — in the face of several FCC orders to the contrary — cannot stand. At the very least, the FCC's prior orders create sufficiently serious questions, going to the merits of the Order, to warrant a stay pending the outcome of this appeal.

rehearing and appeal is warranted under the Commission's three-factor test applicable to non-monetary orders. At the very least, the Commission should enter a stay during rehearing and, if rehearing is denied, for a brief period thereafter to permit Ameritech Illinois to seek from reviewing courts a stay pending appeal.

March 18, 1998

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**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

ILLINOIS BELL TELEPHONE COMPANY
d/b/a AMERITECH ILLINOIS,

Plaintiff,

v.

WORLDCOM TECHNOLOGIES, INC. as successor in
interest to MFS INTELENET OF ILLINOIS, INC.,
TELEPORT COMMUNICATIONS GROUP INC.,
MCI TELECOMMUNICATIONS CORPORATION and
MCI METRO ACCESS TRANSMISSION SERVICES, INC.,
AT&T COMMUNICATIONS OF ILLINOIS, INC., and
FOCAL COMMUNICATIONS CORPORATION

and

DAN MILLER, RICHARD KOLHAUSER, RUTH
KRETSCHMER, KARL MCDERMOTT, and BRENT BOHLEN,
Commissioners of the Illinois Commerce Commission
(In Their Official Capacities and not as Individuals),

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MICHAEL W. DOBBINS
U.S. DISTRICT COURT

98C 1925

Case No. _____

MAGISTRATE JUDGE BOBRICK

JUDGE COAR

COMPLAINT

Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech Illinois"), by and through its attorneys, brings this action for declaratory, injunctive and other relief and alleges as follows:

INTRODUCTION

1. Ameritech Illinois brings this action pursuant to § 252(e)(6) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 151, et seq.) (the "Act") and 28 U.S.C. § 1331 to challenge determinations made by the Illinois Commerce Commission ("Commission" or "ICC"), acting through the defendant

49. Despite the FCC's rulings that the Internet ISP Calls are exchange access traffic, the ICC Order holds that the Internet ISP Calls are not exchange access traffic, but local traffic.

50. The ICC's Order is contrary to governing federal law, and its interpretation of the Agreements, which incorporate governing federal law, is erroneous as a matter of law.

51. Ameritech Illinois is entitled to a declaration that the Order is invalid and to an injunction against enforcement of the Order.

COUNT III

The ICC's Order Violates Controlling Federal Law, Which Assigns Authority Over Interstate Communications To The FCC

52. Ameritech Illinois realleges Paragraphs 1 through 51 as if fully set forth herein.

53. The Communications Act of 1934 creates two distinct spheres of regulation. It reserves to the States exclusive jurisdiction over intrastate communications, and it assigns to the FCC authority over, and responsibility for, interstate communications.

54. In virtually all instances, the Internet ISP Calls are not intrastate communications, but rather are interstate communications.

55. The ICC violated federal law, and the principle of jurisdictional separation, by requiring Ameritech Illinois to pay reciprocal compensation with respect to the Internet ISP Calls.

56. Ameritech Illinois is entitled to a declaration that the Order is invalid and to an injunction against enforcement of the Order.

COUNT IV

The ICC Order Violates Sections 251(b)(5), 252(d)(2) and 251(g) of the 1996 Act

**IN THE UNITED STATES DISTRICT COURT
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d/b/a AMERITECH ILLINOIS,

Plaintiff,

v.

WORLD COM TECHNOLOGIES, INC. as successor in
interest to MFS INTELENET OF ILLINOIS, INC.,
TELEPORT COMMUNICATIONS GROUP INC.,
MCI TELECOMMUNICATIONS CORPORATION and
MCIMETRO ACCESS TRANSMISSION SERVICES, INC.,
AT&T COMMUNICATIONS OF ILLINOIS, INC., and
FOCAL COMMUNICATIONS CORPORATION

and

DAN MILLER, RICHARD KOLHAUSER, RUTH KRETSCHMER, KARL MCDERMOTT, and BRENT BOHLEN,
Commissioners of the Illinois Commerce Commission
(In Their Official Capacities and not as Individuals),

AMERITECH ILLINOIS' MERITS BRIEF

Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech Illinois" or "Ameritech"), by its attorneys, respectfully submits its brief in support of the relief requested in Ameritech's Complaint.

INTRODUCTION

A baseball fan sits at her personal computer in Chicago. She has accessed the Hall of Fame website in Cooperstown, New York, and is looking at "World Series Feats." She clicks on "Triple Plays - Unassisted." A moment later, the response arrives from Cooperstown:

WAMBSGANS, WILLIAM; CLEVELAND INDIANS - 1920.

cousin. Smith's DXC bills Smith for the call, and compensates Ameritech and the CLEC for the use of their networks by paying them exchange access charges. Ameritech does not pay reciprocal compensation to the CLEC.

When Smith calls the Internet, the ISP to whose service Smith subscribes makes the same use of the local network as Smith's DXC does when Smith makes a long distance call to his cousin in Denver. Diagram 3 depicts Smith's call to the Internet: The call originates on Ameritech's network; Ameritech hands off the call to the CLEC at the CLEC's switch; the CLEC delivers the call to the point of presence of Smith's ISP; and the ISP carries the call onto the Internet, from which it is ultimately terminated to far-flung websites or, in the case of an Internet voice call, a distant end user. Just as in Diagram 2, Ameritech provides exchange access for this call — albeit exchange access for which, as we explain below, the FCC has exempted the ISP from paying exchange access charges. This call is not local, and not properly subject to reciprocal compensation.

B. The FCC Holds That Internet Calls Are Not Local, But Interexchange Calls, For Which The Local Exchange Carrier Provides Exchange Access.

Consistent with the foregoing, the FCC has repeatedly ruled that Internet calls are interstate, exchange access calls. The FCC's rulings date back to 1983, when the FCC, in anticipation of the divestiture of the Bell Operating Companies by AT&T, created the access charge regime. At that time, there was no question but that ISPs used the local exchange network in the same way as IXCs to originate and terminate interstate calls. (Ex. 8, p. 5.) Accordingly, the FCC held that "enhanced service providers" — which includes ISPs⁴ — "obtain[] local exchange services or facilities which are used, in part or in whole, for the purpose of completing interstate calls." MTS and WATS Market Structure, 97 F.C.C.2d 682, ¶ 78 (1983)

⁴ See In re Access Charge Reform Price Cap Performance Review for Local Exchange Carriers, CC Dockets 96-262 et al., Third Report and Order, 11 F.C.C. Rcd. 21354, ¶ 284 (1996) (Ex. 9) (the "category of enhanced services . . . includes access to the Internet"); Defendant MCI's Supplemental Memorandum in Opposition to Ameritech Illinois' Motion for Approval of Supersedeas Bond and Stay Pending Review, p. 11 n.9 ("enhanced service provider" . . . is synonymous with 'ISP').

(Ex. 10) (emphasis added). See also id., ¶ 83 (enhanced service providers "employ exchange service for jurisdictionally interstate communications") (emphasis added).

The FCC has repeatedly confirmed this holding over the past 15 years. See Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Notice of Proposed Rulemaking, 2 F.C.C. Rcd. 4305, ¶ 7 (1987) (Ex. 11) (ISPs "like facilities-based interexchange carriers and resellers, use the local network to provide interstate services") (emphasis added); Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Order, 3 F.C.C. Rcd. 2631, ¶ 2 (1988) (Ex. 12) (describing enhanced service providers as "interstate service providers"); In re Access Charge Reform, First Report and Order, FCC 97-158, CC Docket Nos. 96-262 et al., ¶ 341 (May 16, 1997) (Ex. 13) (ISPs "may use incumbent LEC facilities to originate and terminate interstate calls"); In re Bell Atlantic Tel. Cos., 11 F.C.C. Rcd. 6919, ¶ 50 (1996) (Ex. 14) (Internet access service "like exchange access service, will provide access to interLATA Internet providers that will complete connections to servers located in other LATAs"). (A "LATA" is a "Local Access and Transport Area," and any communication that is "interLATA" is by definition not local.)

Most recently, the FCC's April 10, 1998, Report to Congress on universal service reaffirmed the FCC's prior rulings:

When it established the interstate access charge regime in the early 1980s, the Commission determined that enhanced service providers, even though they used local exchange networks to originate and terminate interstate services, would not be subject to access charges. Instead, enhanced service providers pay local business rates to LECs for their connections to the LEC network. (Ex. 3, ¶ 146.)

Like all other interstate, exchange access calls, calls to the Internet are subject to the imposition of exchange access charges. Until now, however, the FCC has exempted Internet calls from those charges. This exemption has been based not on any notion that Internet calls are "local," but on policy reasons that recognize that such traffic is interstate traffic — namely, the FCC's desire to protect the evolving information services industry from rate shock. (Ex. 8, p. 6.) Due to the high costs of exchange access at the time, the FCC determined, first in 1983, that ISP access traffic would not be subject to access charges. As the FCC put it, "[o]ther [exchange access] users who employ exchange service for jurisdictionally interstate communications, including . . . enhanced service providers [like ISPs] . . . who have been paying the generally

much lower business service rates, would experience severe rate impacts were we immediately to assess carrier access charges upon them." MTS and WATS Market Structure, 97 F.C.C.2d 682, ¶ 83 (1983) (Ex. 10) (emphasis added).

At the same time, however, the FCC has made clear that this exemption is temporary, and has admonished that ISPs "have had ample notice of our ultimate intent to apply interstate access charges to their operations and ample opportunity to adjust their planning accordingly." Amendments to Part 69 of the Commission's Rules Relating to Enhanced Service Providers. Notice of Proposed Rulemaking, 2 F.C.C. Rcd. 4305, ¶ 8 (1987) (Ex. 11) (emphasis added).

Each of these rulings — and, indeed, the very fact that the FCC asserted jurisdiction at all — properly recognizes that Internet calls do not originate and terminate within a local service area, but instead provide end users with access to out-of-state, even out-of-country, destinations. If Internet calls were local calls, they would not be subject to access charges in the first place, and the FCC would have had no reason to exempt them from such charges. More, it would not even have had jurisdiction to do so. See 47 U.S.C. §§ 151, 152 (establishing jurisdiction of FCC over interstate, and not intrastate, communications). Nor would it have had any basis for repeatedly reconsidering that exemption, or for stating its "ultimate intent" that the exemption be temporary and that interstate exchange access charges would eventually apply to ISPs.

C. Internet Traffic Cannot Properly Be Subject To Reciprocal Compensation, Because Feature Group A Traffic, Which Is Jurisdictionally Indistinguishable From Internet Traffic, Is Not Subject To Reciprocal Compensation.

A call to the Internet via an ISP, although jurisdictionally interstate, does have some characteristics that are shared by local traffic: The end user initiates the call by dialing a seven-digit number to access the ISP; the ISP's router and the end user are typically in the same service area; and the call is reflected on the end user's bill for local service. (The FCC's exemption of ISPs from access charges effectively requires the local exchange carrier to charge its end user tariffed local rates as a substitute. (Ex. 8, p. 21.)) The Carrier Defendants pluck these attributes from their context, and argue that they mean that an Internet call is a local call. That the Carrier Defendants are wrong is demonstrated by

CONCLUSION

For the reasons set forth above, Ameritech Illinois respectfully urges the Court to enter a Judgment in its favor to grant to Ameritech Illinois all of the relief prayed for in its Complaint.

Dated: May 29, 1998

Respectfully submitted,

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**IN THE UNITED STATES DISTRICT COURT
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EASTERN DIVISION**

ILLINOIS BELL TELEPHONE COMPANY
d/b/a AMERITECH ILLINOIS,

Plaintiff,

v.

WORLDCOM TECHNOLOGIES, INC., et al.,

Defendants

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)
)
) Case No. 98 C 1925
)
) Hon. David H. Coar
)
) Magistrate Judge Bobrick
)
)

AMERITECH ILLINOIS' REPLY BRIEF ON THE MERITS

INTRODUCTION

The Carrier Defendants' baseball fan illustration (Joint Br., at 1) suffers from three fundamental defects. First, the fan accesses five web sites within her local calling area — some at the ISP itself and some a few miles away. But the Carrier Defendants cite no evidence that suggests that any appreciable number of Internet calls go to web sites within the end user's local calling area, much less to web sites located at the ISP itself. More important, the ICC Order that is under review here accepts (correctly) that Internet calls typically go to web sites outside the caller's local area. For purposes of this case, in other words, all Internet calls go to non-local web sites. Thus, the Carrier Defendants' illustration adds local color that has no support in the record and that serves only to obscure the issues in this case.

Second, the fact that Ameritech bills the fan for her Internet call at local calling rates, however weighty the Carrier Defendants try to make it seem, is irrelevant. The undisputed evidence shows that the FCC allows Ameritech (and other incumbent carriers) to bill Internet calls at local rates as a substitute for the access charges from which the FCC has exempted those

II. THE ICC'S BIFURCATION OF INTERNET CALLS IS ERRONEOUS AS A MATTER OF LAW.

A. The Telecommunication Does Not End At The ISP.

The heart of the ICC Order is the ICC's attempt to sever into two parts traffic that is inherently interstate. According to the ICC, and the Carrier Defendants, an Internet call starts out as a telecommunications service between the end user and the ISP (which the ICC deemed a local call); the telecommunications service "terminates" at the ISP; a separate, interstate, information service is generated there; and only that service runs to the World Wide Web.

This notion that the telecommunications component of an Internet call runs from end user to ISP, at which point the information service kicks in, is absolutely central to the defendants' position. As the Carrier Defendants put it, "[t]he defendants are entitled to reciprocal compensation for the call to the ISP because that call -- and only that call -- is telecommunications services." (Joint Br., at 3) (emphasis added).

The Carrier Defendants are dead wrong, and the language just quoted epitomizes the error that permeates the defendants' theory. The information service provided by the ISP does not run only between the ISP and the World Wide Web. It runs all the way to the end user, because the ISP provides its service to the end user. Likewise, the telecommunication does not run only between the end user and the ISP. Rather, ISPs use telecommunications services for the entire end-to-end transmission between the end user and the Internet. Just like the familiar long-distance telephone call, the information service rides between the end user and the ISP on a telecommunications access service provided by Ameritech Illinois, and it rides between the ISP and the end user's Internet destination of choice on an interstate telecommunications service

(sometimes known as a "backbone network") provided by other telecommunications carriers.^{4/} In other words, as section 3(20) of the Communications Act itself puts it, ISPs provide their services "via telecommunications." The so-called "call to the ISP" is not, as the Carrier Defendants assert and as the ICC assumed, the only telecommunications service involved.^{2/}

The FCC's April 10, 1998, Universal Service Report repeatedly recognizes that telecommunications underlie the entire information service provided by ISPs, and repeatedly refutes the defendants' view that "the call to the ISP . . . — and only that call — is telecommunications services." See, e.g., Universal Service Report, ¶ 66:

Internet service providers typically utilize a wide range of telecommunications inputs. Commenters have focused much attention on the fact that [ISPs] purchase analog and digital lines from local exchange carriers to connect to their dial-in subscribers What has received less attention is that [ISPs] utilize other, extensive telecommunications inputs. While a large [ISP] engages in extensive data transport, it may own no transmission facilities. To provide transport within its own network, it leases lines . . . from telecommunications carriers. To ensure transport beyond the edges of its network, it makes arrangements to interconnect with one or more Internet backbone providers. . . .

. . . . The provision of leased lines to [ISPs] however, constitutes the provision of interstate telecommunications. (Emphasis added and footnotes omitted.)

And with this in mind, the FCC concludes that both types of telecommunications that underlie Internet service — the "backbone" network and the arms that provide end users with access to

^{4/} Indeed, some of the "Internet backbone providers" that carry traffic from the ISP to the Internet — Sprint, for example, see Universal Service Report, ¶ 63 — are more widely known as long-distance telephone carriers.

^{2/} It is true that the access service terminates at the ISP. The telecommunication, however, does not terminate at that point, but is taken over by other telecommunications carriers, just as when Ameritech hands off an interstate telephone call to a long-distance carrier. In each instance, the FCC classifies each portion of the transmission as interstate, because the end-to-end transmission is interstate.

that network — are not just telecommunications, but interstate telecommunications. Universal Service Report, ¶ 55 (“We conclude that entities providing pure transmission capacity to Internet access or backbone providers provide interstate ‘telecommunications’”) (emphasis added).

Neither the ICC Order nor the defendants’ briefs confront, much less dispute, this dispositive point. To be sure, the Carrier Defendants grudgingly admit that “ISPs use telecommunications in providing information services” (Joint Br., at 11), but they refuse to acknowledge the significance of that fact. Yet the end-to-end analysis is the only one that comports with the FCC’s rulings. The FCC has known all along that information service providers provide information services. If there were truly a clean break between the purported “local” telecommunications service and the interstate information service, or if the distinction between information services and telecommunications services made any difference whatsoever in this context, the FCC would not have ruled (as it has so many times over the last decade and a half) that ISPs receive interstate access services from local exchange carriers like Ameritech.⁴⁷ Nor would the FCC have bothered to grant, and then periodically reconsider, an exemption to

⁴⁷ The defendant Commissioners devote much of their brief (pp. 4-8) to a non-issue: whether or not the service provided to ISPs by local exchange carriers is a “Switched Exchange Access Service” under the Agreements. That discussion is singularly irrelevant. As the Carrier Defendants concede (p. 3), “[t]he only issue here . . . is whether the call made to the ISP is ‘local traffic’ under the interconnection agreements.” If Internet calls are not “local traffic” under the Agreements, then they do not qualify for reciprocal compensation, and that is the end of the matter. True, if the service provided to ISPs is “Switched Exchange Access Service” under the Agreements, then that represents another ground for reversing the ICC Order, because the Agreements specifically exclude Switched Exchange Access Services from reciprocal compensation. But that would merely bring coals to Newcastle, and Ameritech does not argue here that Internet calls are “Switched Exchange Access Service” under the Agreements.

ISPs from the interstate access charges that would otherwise apply to the services they receive.²⁷ Nor, finally, would the FCC have ruled in the BellSouth voice-mail case (Ex. 18) that a call to an out-of-state voice mail service is a single interstate call, rather than two separate communications, because the voice-mail calls in that case, just like the Internet calls in this case, consisted of what the defendants here would call a telecommunication service followed by a separate, enhanced service — the voice-mail service itself.²⁸

Astoundingly, given the FCC precedents cited at pp. 7-9 of Ameritech's opening brief, the ICC asserts that "there is simply no support for the proposition that the FCC has ever asserted jurisdiction over . . . calls to Internet ISPs." (ICC Br., at 8.) The truth is that the FCC has held that enhanced service providers, which includes ISPs, receive "exchange access" services from local exchange carriers. When it adopted the interstate access charge regime in 1983, the FCC not only realized that ISPs use exchange access services, but also intended to impose access charges on them. At that time, the FCC recognized the need for a uniform structure for access charges "covering those services that make identical or similar use of access facilities," including the information services provided by "enhanced service providers" such as ISPs. MTS and WATS Market Structure, 93 F.C.C. 2d 241, 250 (1983). It was only upon reconsideration that the FCC carved out the now-familiar exemption for ISPs. MTS and WATS Market Structure, 97 F.C.C.2d 682, ¶ 83 (1983) (Ex. 10):

²⁷ The defendants, unable seriously to dispute that the FCC's access charge rulings, contend that the rulings are outdated. See ICC Br., at 7; Joint Br., at 13-14. Neither response brief, however, addresses the FCC's most recent pronouncement: its reaffirmation this past April that ISPs "use[] local [telephone] exchange networks to originate and terminate interstate services." Universal Service Report, ¶ 146 (emphasis added.)

²⁸ The information service provided by ISPs is an "enhanced service." See Am. Br. at 7 n. 4.

At present, resellers and other carriers pay carrier-type access charges . . . when they resell private line service in their provision of MTS/WATS-type services. We believe that it is reasonable similarly to require that carrier access charges be applied to any private line reseller to which ENFIA would have applied. Other users who employ exchange service for jurisdictionally interstate communications, including private firms, enhanced service providers, and sharers, who have been paying the generally much lower business service rates, would experience severe rate impacts were we immediately to assess carrier access charges upon them. (Emphasis added).

Considering the underscored language, not to mention the jurisdiction that the FCC has asserted over precisely the issue in this case, the ICC's assertion that the FCC has never asserted jurisdiction over the calls at issue here is preposterous.

B. The FCC Has Rejected The ICC's Approach.

The FCC's rejection of the ICC's attempted division of Internet calls, implicit in 15 years of access charge jurisprudence, is painstakingly explicit in its Universal Service Report. There, the FCC made quite clear that the reciprocal compensation issue now before this Court "does not turn on the status of the Internet service provider as a telecommunications carrier or information service provider." Universal Service Report, ¶ 106, n.220 (emphasis added).

The conflict between the Universal Service Report and the ICC's segmentation approach is unmistakable, and the defendants' inability to address it is just as clear. The Commissioners recognize the conflict, but try to downplay it with the limp assertion that "the FCC did not state that the telecommunications/information services distinction is irrelevant to or plays no part in reaching a decision of the reciprocal compensation issue. It only stated that the issue did not 'turn' on the status of the ISP." (ICC Br., at 12.) This wordplay only highlights the deficiencies in the ICC Order, which in fact does "turn on" precisely the telecommunications/information services distinction that the FCC repudiated. Indeed, the very heading in the Commissioners'